MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1162

UNITED STATES OF AMERICA,

Petitioner,

-v.-

THOMAS JOSEPH WILSON and
BOBBY ANTONIO BRYAN,

Respondents.

APPLICATION ON BEHALF OF
THOMAS JOSEPH WILSON
FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

To: THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT

Respondent Thomas Joseph Wilson respectfully seeks leave to proceed here in forma pauperis. Counsel's affidavit in support of this application is annexed.

Respectfully submitted,

WILLIAM E. HELLERSTEIN,
PHYLIS SKLOOT BAMBERGER,
Attorneys for Respondent
THOMAS JOSEPH WILSON
THE LEGAL AID SOCIETY,
FEDERAL DEFENDER SERVICES UNIT
606 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

New York, New York
March 7, 1974

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AFFIDAVIT

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

SHEILA GINSBERG, being duly sworn, deposes and says:

I am an attorney associated with William E. Hellerstein and Phylis Skloot Bamberger, The Legal Aid Society, Federal Defender Services Unit. I make this affidavit in support of respondent Thomas Joseph Wilson's application for leave to proceed here in forma pauperis.

At his trial, respondent Wilson was represented by The Legal Aid Society, Federal Defender Services Unit, assigned by the United States District Court for the Southern District of New York pursuant to the Criminal Justice Act.

The United States Court of Appeals for the Second Circuit continued the assignment on his appeal to that Court.

Mr. Wilson is currently incarcerated serving the sentence imposed by the District Court for bank robbery.

On information and belief, Mr. Wilson's financial status has not changed since the original assignment of counsel.

WHEREFORE, it is respectfully prayed that respondent Thomas Joseph Wilson be permitted to proceed here in forma pauperis.

Sheila Ginsberg
SHEILA GINSBERG

Sworn to before me this
7 day of March 1974

Phylis Skloot Bamberger
Notary Public

PHYLIS SKLOOT BAMBERGER
Notary Public, State of New York
No. 31-
Qualified in New York County
Commission Expires March 30, 1975

MAR 8 1974
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BRIEF FOR THOMAS JOSEPH WILSON IN OPPOSITION TO THE GOVERNMENT'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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SHEILA GINSBERG,
Of Counsel

IN THE

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OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit reversing the judgment of the District Court and included as Appendix A to the petitioner's appendix, is now officially reported at 488 F.2d 1231.

STATEMENT OF THE CASE

Respondent Thomas Joseph Wilson adopts the statement in the petition for writ of certiorari, with the following additions and corrections:

After respondent had pleaded guilty to bank robbery before The Honorable Morris E. Lasker, but before he was sentenced, he was called by the Government to testify in the trial (also before Judge Lasker) of his co-defendant, Robert Anderson.

When, out of the presence of the jury,* respondent refused in an orderly and respectful manner to testify, asserting his Fifth Amendment privilege against self-incrimination, defense counsel moved for a brief continuance to allow her to research adequately the legal issues of survival of the privilege after the plea of guilty and the sufficiency of a grant of immunity to protect respondent from prejudice to the future sentence to be imposed pursuant to his plea of guilty to the bank robbery** (88***). The trial judge denied the motion.

Instead, in an effort to obviate respondent's need to assert the privilege, the trial judge decided to accelerate the sentencing procedure, review the pre-sentence report, and impose sentence for the bank robbery immediately. However, after hearing the probation officer (93-96) and defense counsel on the matter of respondent's history, including his psychiatric problems, the trial judge declined to impose sentence, concluding:

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*The jury had been excused before respondent was called to the witness stand, and thus the orderly refusal to testify and the proceeding in which respondent was summarily found to be in contempt were conducted out of the jury's presence.

**The Court of Appeals rejected petitioner's assertion made again in this Court (petition at 7, fn.3) that defense counsel had failed to object to the summary procedure, and held sufficient the explicit request for a continuance to allow for research and the presentation of a defense.

***Numerals in parentheses are references to pages of the transcript of the trial of Robert Joel Anderson. The entire portion of the transcript which concern's respondent's refusal to testify has been lodged by petitioner with the Clerk of the Court.

> ... I do not believe that in this complicated case I have sufficient information before me justly to proceed to sentence with Mr. Wilson.
>
> (103).

There followed in rapid succession a grant of immunity, respondent's reaffirmance of the privilage and his refusal to testify, a summary finding of contempt, and imposition of a six-month term of imprisonment to be served consecutively to whatever sentence respondent would, in the future, receive on the pending bank robbery conviction.

REASONS FOR DENYING THE WRIT

The petitioner, in essence, proffers three arguments as to why the writ of certiorari should be granted to review the decision of the Court of Appeals. None, however, supports the request.

I

Petitioner first claims that Harris v. United States, 382 U.S. 162 (1965), which precludes a summary finding of contempt pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure for an orderly refusal to testify before the grand jury, does not apply to a situation where the refusal to testify occurred in open court.

The explicit language of Harris precludes petitioner's interpretation. Harris explains that summary disposition as provided for in Rule 42(a) is available only in "exceptional circumstances" where, for example, the judge must act instantaneously to quell a disturbance or halt obstreporous conduct in order to restore the dignity and authority of the court. Harris v. United States, supra, 382 U.S. at 164. See also Cooke v. United States, 267 U.S. 517 (1925); Ex Parte Terry,

128 U.S. 289 (1888). The rationale for this limitation on the use of the summary contempt power is the congressional and judicial fear of the abuse of the power. Harris v. United States, supra, 382 U.S. at 164.

Consequently, the perimeters of its exercise are defined by the "least possible power adequate to the end proposed." Anderson v. Dunn, 6 Wheat 204, 231 (1821). It follows that in a situation where the court's authority is endangered by physical violance or destruction or verbal abuse occurring in open court, the judge must have the power to act immediately to restore order, and he is given that power by Rule 42(a). Cooke v. United States, supra; Ex Parte Terry, supra. In all other situations, the "normal procedure" to be followed is set forth in Rule 42(b) which, in accordance with requirements of due process, provides for notice, a hearing, and an opportunity to prepare and present a defense. Harris v. United States, supra, 382 U.S. at 165. The Court concluded, in Harris, that a witness' orderly refusal to testify before the grand jury, not being an "exceptional circumstance,"* required a hearing pursuant to Rule 42(b).

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*Petitioner makes an unsuccessful attempt to convert an orderly refusal to testify into an "exceptional circumstance" because it results in a delay in the trial, requiring prompt judicial action in the form of a criminal contempt citation. What petitioner fails to consider is that the trial judge, in order to compel testimony, has within his power the ability to imprison summarily a recalcitrant witness upon a finding of civil contempt. In fact, the trial judge is required to consider first the feasibility of coercing testimony through imposition of civil contempt before imposing criminal contempt. Shillitani v. United States, 384 U.S. 364, 371 fn.9 (1966). Even when, as here, the trial is short, the remedy of civil contempt is effective to obtain the desired testimony. The witness will remain in prison throughout the trial, encouraged to testify by his ability to obtain his own release. At the end of the trial if the witness still has not complied, the court is not, as petitioner would have it, without the remedy of criminal contempt. The court can avail itself of this remedy to punish, and do so in accord with due process requirements.

Notwithstanding this clear demarcation, petitioner would have as controlling the fact that the refusal occurred before the grand jury, and would have Harris and its predecessors (Cooke v. United States, supra; Ex Parte Terry, supra) re-interpreted to mean that the only factor in determining the availability of the summary procedure to a charge of contempt is whether the act occurred in "open court." Judge Taft's opinion in Cooke v. United States, supra, considered and rejected this argument, holding that a summary disposition was permissible only when restoration of the court's authority required it, and that the court's personal knowledge of the events, obviating the need for a hearing, enabled him in otherwise appropriate circumstances to conduct such a proceeding:

> ... Punishment without issue or trial was so contrary to the usual and ordinary indispensible hearing before judgment, constituting due process, that the assumption that the court saw everything that went on in open court was required to justify the exception; but the need for immediate penal vindication of the dignity of the court created it.
>
> Id., 267 U.S. at 536.

See also United States v. Willet, 432 F.2d 202 (4th Cir. 1970); United States ex rel. Robson v. Malone, 412 F.2d 848, 850 (7th Cir. 1969).

The holding in Groppi v. Leslie, 404 U.S. 496 (1972),* supports this analysis. In Groppi, the Court found a summary disposition of contempt unavailable to punish even obstreporous conduct committed in the presence of the legislature when the lapse of two days precluded the possibility that the summary finding was necessary to restore the chamber's authority. Id., 403 U.S. at 503-04.

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*Ironically, this case is cited by the Government for its position that the only determinative factor is the occurrence of the contempt in "open court."

Similarly, the Government's corollary argument, that the judge's having heard the alleged contempt there remains "no purpose" to the hearing, is considered and explicitly rejected in Harris. In Harris, where, as here, there was no dispute over the fact of the witness' refusal to testify, the Court found that notice and a hearing were nonetheless critical to the determination of the issue of contempt:

> What appears to be a brazen refusal to cooperate with a grand jury may indeed be a case of frightened silence. ... Other extenuating circumstances may be present. ... [T]he record ... reveals only the bare bones of demand and refusal. If justice is to be done, a sentencing judge should know all the facts. ... Our point is that a hearing and only a hearing will elucidate all of the facts and assure a fair administration of justice.
>
> Id., 382 U.S. at 166-67.

Denial of a hearing and time to prepare precluded the presentation to the trial court of a legal defense to the charge of contempt, which involved complex questions of whether a Fifth Amendment privilege survives a guilty plea,* and then whether a grant of immunity, in these circumstances, is co-extensive with the privilege. Kastigar v. United States, 406 U.S. 441 (1972).

Moreover, the lack of a hearing on adequate notice severely limited counsel's efforts to develop fully the pertinent facts which existed in mitigation of contempt. For example, the record reveals the strong possibility of a psychiatric defense for respondent's refusal to testify. Groppi v. United States, 404 U.S. at 505. Respondent's psychiatric problems were revealed not on the contempt charge, but rather in the aborted effort to sentence him on the bank robbery charge before he was called as a witness. Ironically, the

*This question still has not been determined. United States v. Wilson, 488 P.2d 1231, 1233 (2d Cir. 1973).

district judge concluded there was not sufficient psychiatric information to sentence respondent on the bank robbery at that time, but then proceeded, five minutes later, and without consideration of respondent's mental problems, to sentence him for contempt. Because of the haste with which respondent was found in contempt, the record is silent, as it was in Harris, on other facts which may exist in mitigation of the charge.

II

Petitioner argues that there is a conflict as to the applicability of Rule 42 and Harris v. United States, supra, which has developed between the Second Circuit and the Sixth and First Circuits, requiring issuance of the writ. However, no conflict exists. Petitioner is mistaken in asserting that United States v. Seaver, 472 F.2d 607 (6th Cir. 1973), and Baker v. Eisenstadt, 456 F.2d 832 (1st Cir. 1972), have interpreted Rule 42(a) and Harris to mean that the only critical element is whether the contempt was committed within the view and hearing of the court. In Seaver, the applicability of Rule 42(a) was neither raised nor questioned, and consequently was not considered by the Court of Appeals. In Baker v. Eisenstadt, a habeas corpus proceeding challenging a state finding of contempt, the Federal Rules of Criminal Procedure do not apply.

III

Finally, petitioner argues, citing Groppi v. Leslie, supra, that if Harris v. United States, supra, controls this case, Harris should be overruled. However, Groppi does not support this contention. The language quoted from Groppi in the petition at 14 is not addressed to the availability of a summary proceeding to an orderly refusal to testify, but

rather to the requirement that to conduct the summary proceeding the court must have observed all the elements of the misconduct. Harris v. United States, supra, was correctly decided: it reaffirms the previous judicial analysis of the court's limited authority to punish summarily for contempt (Cooke v. United States, supra; Ex Parte Terry, supra), and is properly the controlling principle.

CONCLUSION

Since there is no substantial question properly before the Court, and since the decision below is correct, the petition for wirt of certiorari should be denied.

Respectfully submitted,

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